ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Streamlining Broadcast EEO	)	
Rules and Policies,	)	
Vacating the EEO	)	MM Docket No. 96-16
Forfeiture Policy	)	
Statement And Amending	)	
Section 1.80 of the	)	
Commission's Rules to	)	
Include EEO Forfeiture	)	
Guidelines	)	

COMMENTS OF THE CENTER FOR INDIVIDUAL RIGHTS

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COMMENTS OF THE CENTER FOR INDIVIDUAL RIGHTS

The Center for Individual Rights ("CIR") hereby submits its comments on the Commission's *Notice of Proposed Rulemaking* in the above-entitled proceeding.[1] CIR is a law firm that seeks to preserve constitutional liberties through litigation in the public interest. Rulings obtained by CIR in the Supreme Court and the lower courts have shaped the law in the areas of freedom of the press and religious freedom[2] and protections against discrimination in broadcasting.[3]

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[1] *Order and Notice of Proposed Rulemaking*, MM Docket No. 96-16, FCC 96-49 (released February 16, 1996).

[2] *See, e.g., Rosenberger v. Rector and Board of Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995)(holding that the First Amendment entitled a religious publication represented by CIR to be funded by a public university on a non-discriminatory basis).

[3] *See, e.g., Lamprecht v. Federal Communications Commission*, 958 F.2d 382 (D.C. Cir. 1992)(voiding FCC's gender-preference policy).

I. INTRODUCTION: The FCC's Current Exemption for Religious Broadcasters from the Rules Barring Religion-Based Hiring Should Be Broadened to Parallel §702 of the Civil Rights Act In Order to Safeguard Religious Freedom.

Seeking to "improve" the equal employment opportunity ("EEO") rules governing broadcast licensees, the Commission has noted the possibility that some of its EEO rules may unnecessarily burden certain "distinctly situated broadcasters." CIR believes that the EEO rules do indeed burden one class of "distinctly situated broadcasters," religious broadcasters, whose ability to disseminate their views is closely connected to the ability to hire individuals who share those views. The Commission's current prohibition on religious discrimination infringes religious broadcasters' rights under the Religion Clauses of the First Amendment by denying them the freedom to hire and promote employees whose practices and beliefs are consonant with a broadcaster's religious views.[4]

CIR believes that the narrow exemption to the Commission's religious discrimination prohibition now recognized under the *King's Garden* policy should be broadened to parallel the treatment of religious entities under Section 702 of the principal federal antidiscrimination law, Title VII of the 1964 Civil Rights Act.[5] Under such a rule, the Commission would

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[4] The prohibition also conflicts with the Religious Freedom Restoration Act. Since the Religious Freedom Restoration Act has been discussed at length in the comments that have been submitted to the FCC by other interested parties, such as the National Religious Broadcasters, this set of comments addresses only the First Amendment implications of the FCC's current policy.

[5] 42 U.S.C. § 2000e-1.

permit religious broadcasters to establish religious belief or affiliation as a *bona fide* occupational qualification ("BFOQ") for all station employees.

CIR believes that the Religion Clauses of the First Amendment require the Commission to broaden the exemption for religion-based hiring, and that creating an exemption paralleling Section 702 would minimize the risk of any collision with the First Amendment.

II. The Current Rules Restricting Religion-Based Hiring By Religious Broadcasters Are Based on Outdated Case Law That Erroneously Fails to Acknowledge the Constitutionality of Exempting Religious Organizations from Laws Against Discrimination.

The current policy, which contains only a narrow exemption for religious broadcasters from the FCC's ban on employment discrimination based on religion, was issued by the Commission and ruled on by the courts more than two decades ago in the *King's Garden* decision.[6] Limited to those positions "connected with the espousal of the [broadcaster]'s religious views,"[7] the exemption was framed by the FCC to be "[i]n keeping with the exemptions" contained in Title VII of the Civil Rights Act.[8]

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[6] *In re King's Garden, Inc.*, 34 F.C.C.2d 937 (1972), *aff'd sub nom., King's Garden v. F.C.C.*, 498 F.2d 51 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 996 (1974).

[7] *In re King's Garden*, 34 F.C.C.2d at 938; *In re Request of National Religious Broadcasters*, 43 F.C.C.2d 451, 452 (1973); *King's Garden v. FCC*, 498 F.2d at 53.

[8] 34 F.C.C.2d at 938. The Civil Rights Act originally exempted from its provisions religious corporations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation. . .of its

Less than a year after the FCC's adoption of the *King's Garden* policy, Congress greatly broadened the Title VII exemption to allow religious entities to make religion a criterion for hiring for any position.[9] In upholding the FCC exemption, and refusing to broaden it, the D.C. Circuit expressed its view that the broader Title VII exemption would be held unconstitutional in violation of the Establishment Clause.[10] This prediction, a foundation of the *King's Garden* decision, proved to be erroneous.[11]

III. The Free Exercise Clause Requires the FCC to Broaden Its Exemption for Religious Broadcasters from the Ban on Religion-Based Hiring, Since Limiting the Exemption to "Persons Connected With The Espousal of Religious Views" Places Too Substantial a Burden on Religious Broadcasters' Free Exercise of Religion.

Although society has a strong interest in eradicating religious discrimination, the Constitution limits the means by which this end may be achieved. While incidental burdens on religious freedom resulting from a prohibition on religious discrimination are permissible, more substantial burdens often are not. "Courts must distinguish between incidental burdens on free exercise in the service of a compelling state interest from

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religious activities." See 34 F.C.C.2d at 937.

[9] Equal Employment Opportunities Act of 1972, P.L. 92-261, 86 Stat. 103 (amending 42 U.S.C. §2000e-1).

[10] *King's Garden v. F.C.C.*, 498 F.2d at 60-61.

[11] *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987)(upholding Title VII religion-exemption against an Establishment Clause challenge).

burdens where the 'inroad on religious liberty' is too substantial to be permissible."[12]

The more central a position is to the dissemination of a religious entity's message, the greater will be the burden suffered by the entity in complying with antidiscrimination rules that restrict its right to select candidates to fill the position, and, thus, the greater the degree of protection afforded by the Free Exercise clause to the religious entity's freedom to choose who will fill that position. Thus, the courts have invariably held that the government is forbidden by the Free Exercise Clause from banning any form of discrimination, not just religious discrimination, in the selection of those who are the "voice of the church,"[13] including clergy,[14] theology

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[12] *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1993)(quoting *Rayburn*); *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972)(only "incidental" burdens permissible); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1504 (W.D.Mich. 1985)(quoting *McClure*). This line of cases survives the Supreme Court's ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990). *E.g.*, *Equal Employment Opportunity Commission v. Catholic University of America*, 83 F.3d 455, 461-63 (D.C. Cir. 1996).

[13] *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1358 (D.C. Cir. 1990).

[14] *Rayburn* (construing Title VII not to apply to clergy hiring in order to avoid endangering religious freedom); *Young* (same); *McClure* (same); *Minker* (same); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989)(same); *Little v. Wuerl*, 929 F.2d 944, 947 (3d. Cir. 1992)("courts have consistently found that Title VII does not apply to the relationship between ministers and the religious organizations that employ them, even when the discrimination is alleged on the basis of race or sex").

professors[15] and teachers,[16] and any other employee whose "primary duties consist of teaching, spreading the faith. . .or supervision or participation in religious ritual or worship."[17] As the D.C. Circuit recently emphasized, the exemption "has not been limited to members of the clergy," but also applies to "lay employees" of a religious organization whose function is "important to [its] spiritual and pastoral mission."[18]

By contrast, government's power to prohibit discrimination in selecting candidates for the remaining positions within religious organizations is greater but still subject to constitutional limits. Because these positions are less sensitive, the government may prohibit race and sex discrimination in selecting employees to fill them; however, the Free Exercise Clause protects a religious organization's right to make religion a criterion for selection against governmental interference.[19] Thus, with respect to most employee positions,

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[15] E.g., *Equal Employment Opportunity Commission v. Catholic University of America*, 83 F.3d 455 (D.C.Cir. 1996).

[16] *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994); *see* E.E.O.C. v. Catholic Univ. of America, 83 F.3d at 461 (citing *Powell*).

[17] *Rayburn, supra*, 772 F.2d at 1169 (internal citations omitted); *E.E.O.C. v. Catholic University of America*, 83 F.3d at 461 (quoting *Rayburn*).

[18] *E.E.O.C. v. Catholic Univ. of America*, 83 F.3d at 461.

[19] *E.g., Little v. Wuerl*, 929 F.2d 944 (Free exercise of religion "obviously endangered" by religious discrimination lawsuit brought by Protestant teacher of lay subjects in Catholic school); *Madsen v. Erwin*, 395 Mass. 715 (1985)(religious organization has free exercise right to discharge lesbian employee because her lifestyle was in conflict with church teachings); *see also Ritter*

religious broadcasters have a constitutional right to discriminate on the basis of religion, but not race or sex.

The FCC's current exemption covers only those persons "connected with the espousal of. . .religious views."[20] The FCC has interpreted this standard narrowly to exclude many categories of station employees, such as announcers.[21] But journalists employed by religious media engage in religious activities shielded by the First Amendment even when they help a religious broadcaster perform secular functions that contribute to the overall success of its religious mission.[22] For example, *The Christian Science Monitor* is a Pulitzer-prize winning newspaper that carries a daily religious article as well as dozens of predominantly secular news stories; many of its staff never cover religious issues. Nevertheless, the work of a reporter at *The Monitor* is a religious activity exempted from Title VII's

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v. Mount St. Mary's College, 495 F. Supp. 724, 729 (D. Md. 1980)(sex discrimination lawsuit could be brought by lay faculty member at Catholic college, but only because it did not call into question the college's religious policies and priorities);

[20] *In re King's Garden*, 34 F.C.C.2d at 938.

[21] *See In re Request of National Religious Broadcasters*, 43 F.C.C.2d 451, 452 (1973)(announcers are not, as a general rule, exempt).

[22] *E.g., Feldstein v. Christian Science Monitor*, 555 F. Supp. 974, 978 (D. Mass. 1983)(position of reporter in daily newspaper affiliated with church is religious activity, even when the newspaper covers a great deal of secular news). *Feldstein* actually understates a broadcaster's interest in religious autonomy, since the court's analysis was colored by its belief that allowing a religious organization to make religion a criterion for selecting employees for non-religious activities was an undue preference for religion in violation of the Equal Protection Clause - a view later squarely rejected by the Supreme Court in *Amos*, 483 U.S. at 342.

prohibition on religious discrimination, in light of the fact that the primary purpose of *The Monitor* as an entity "is a missionary one to try and interest individuals" in the Christian Science religion, and the Monitor's operations do not lose their First Amendment protection "merely because [the newspaper] holds some interest for persons not members of that faith, or occupies a position of respect in the secular world at large."[23]

More generally, the protections of the Free Exercise Clause are not limited to positions in religious organizations that involve religious activities. Because the conflicting religious practices of employees with non-religious duties may nevertheless seriously impair the mission of a religious organization, the Free Exercise Clause also protects a religious organization's right to make religion a criterion for hiring even in positions that perform predominantly non-religious activities.[24] For example, in *Little v. Wuerl*,[25] the Third Circuit Court of Appeals upheld the dismissal of a Protestant teacher in a Catholic school, despite the fact that she "was not given responsibility for teaching religion,"[26] because her remarriage to a divorced Catholic violated a provision in her employment contract barring teachers from "public rejection of the official teachings,

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[23] *Id.* at 978.

[24] *E.g., Madsen v. Erwin, supra; Little v. Wuerl, supra.*

[25] 929 F.2d 944.

[26] *Id.* at 945 (3d. Cir. 1991).

doctrine, or laws of the Catholic Church."[27] It was enough that the religious employer asserted that "her conduct d[id] not conform to Catholic mores."[28] The court refused to second-guess the employer's determination that the "employee's beliefs or practices ma[d]e her unfit to advance [the employer's] mission," emphasizing that such an inquiry is unfit "for scrutiny by secular courts" and that religious organizations have a "constitutionally protected interest in managing their affairs free of government interference."[29]

The First Amendment not only validates Title VII's exemption from religious discrimination for religious organizations; it requires that the exemption be construed broadly.[30] Thus, exempting religious organizations from the prohibition against religious discrimination is no mere act of legislative grace that the FCC may choose not to emulate. It is a policy that is necessary to avoid a collision with the Free Exercise Clause.

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[27] *Id.* at 946.

[28] *Id.* at 945.

[29] *Id.* at 947.

[30] E.g., *Little v. Wuerl*, 929 F.2d at 945 (Because of constitutional considerations, "we interpret the exemption [§702 of Title VII] broadly."); *Maguire v. Marquette University*, 627 F. Supp. 1499, 1506 (E.D. Wis. 1986), *aff'd in part, vacated in part on other grounds*, 814 F.2d 1213 (7th Cir. 1987)("Because the First Amendment prevents the Court from involving itself in this area, the Court finds that the exception to Title VII. . .should be read to allow. . .broad latitude. . .to hire 'employees of a particular religion.'").

IV. The FCC Risks An Establishment Clause Violation In Limiting Its Exemption to Positions "Connected With the Espousal of Religious Views," Since This Limitation Requires the FCC to Make Judgments That Entangle Itself in Religion.

Under the current *King's Garden* rule, the FCC must inquire into the relationship between a particular position and the mission of a religious broadcaster to see if religion is a BFOQ for the position. This policy is in sharp tension with the Supreme Court's Establishment Clause jurisprudence. In *NLRB v. Catholic Bishop of Chicago*,[31] the Supreme Court held that the National Labor Relations Board could not constitutionally adjudicate disputes over collective bargaining at church-run schools, since any such adjudication would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission."[32] The *King's Garden* rule requires the FCC to do exactly what the Supreme Court forbade administrative agencies to do in *Catholic Bishop* - engage in an "inquiry into the good faith of the position asserted by the [religious broadcaster] and its relationship to the [broadcaster's] religious mission."[33] By

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[31] 440 U.S. 490 (1978).

[32] *Catholic Bishop*, 440 U.S. at 502. *Cf. Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457-58 (1988) (rejecting as impermissibly intrusive the judicial inquiry into the tenets of a religion that would be required to assess the centrality of an activity to the religion).

[33] For example, functions such as program introduction and the news insertion, which are deemed peripheral to a broadcaster's religious views, are generally outside the ambit of the current exemption, *see, e.g., In re Request of National Religious Broadcasters*, 43 F.C.C.2d 451, 452 (1973), placing the burden on a broadcaster seeking an exemption to show that a job involving these

contrast, § 702 of the Civil Rights Act establishes a clear, bright-line rule by exempting all of a religious entity's employees from the ban on religion-based hiring, thus avoiding any collision with the Establishment Clause.

Applying the rule laid down by the Supreme Court in *Catholic Bishop*, the courts have held that the Establishment Clause forbids banning religious discrimination in hiring by religious organizations, even when the position in question is a lay position that has been performed in the past by persons who are not members of the religious organization's parent church.[34] For example, a Protestant lay teacher's suit against a Catholic school that discharged her for entering into a marriage not recognized by Catholic doctrine was dismissed by the court of appeals, which interpreted Title VII's exemption for the activities of religious organizations broadly in light of the Establishment Clause because "inquiry into the employer's religious mission was not only likely, but inevitable," in that the discrimination claim raised the issue of whether the employee's beliefs or practices detracted from the school's religious mission.[35] Similarly, the D.C. Circuit rejected a discrimination claim because adjudicating it would require the

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functions is closely-related to espousing its religious message.

[34] *E.g.*, *Little v. Wuerl*, 929 F.2d 944 (3d. Cir. 1991)(quoting from *NLRB v. Catholic Archbishop of Chicago*).

[35] *Little v. Wuerl*, 929 F.2d at 949.

court to choose "among 'competing religious visions.'"[36]

The courts have consistently applied the rule of *Catholic Bishop* to limit the reach of the antidiscrimination laws,[37] barring religious discrimination claims where adjudicating them would require inquiry into the degree of conflict between an employee's religion and the employer's religious mission,[38] and all types of discrimination claims involving clergy,[39] teachers of theology,[40] and others who perform "spiritual functions."[41]

A broad exemption from the prohibition against religious discrimination is also supported by the fact that the Establishment Clause frowns on the very process of investigating religious employment decisions, not simply any erroneous findings that may result. The Supreme Court has emphasized that "It is not only the conclusions that may be reached. . .which may impinge on rights guaranteed by the Religion Clauses, but also

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[36] *E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 465 (D.C. Cir. 1996).

[37] *See, e.g., Scharon*, 929 F.2d at 363 (applying *Catholic Bishop* in rejecting discrimination claim); *Rayburn*, 772 F.2d at 1171 (same); *Powell*, 859 F. Supp. at 1348-49 (same).

[38] *E.g., Little v. Wuerl*, 929 F.2d at 948-951.

[39] *Scharon*, 929 F.2d at 362-63; *Rayburn*, 772 F.2d at 1169-1171; *McClure*, 460 F.2d at 558-560; *Little v. Wuerl*, 929 F.2d 944, 947 (3d. Cir. 1992)("courts have consistently found that Title VII does not apply to the relationship between ministers and the religious organizations that employ them, even when the discrimination is alleged on the basis of race or sex").

[40] E.g., *Equal Employment Opportunity Commission v. Catholic University of America*, 83 F.3d 455, 465 (D.C.Cir. 1996); *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994).

[41] *Rayburn, supra*, 772 F.2d at 1171.

the very process of inquiry leading to findings and conclusions."[42] The courts of appeals have invoked this language to bar discrimination claims despite complainants' arguments that their religious practices would not impede their employer's religious mission.[43]

Thus, even if the FCC ultimately concludes after investigation that religion is a BFOQ for a particular broadcasting position, and rejects a charge of discrimination, the investigation into the position's BFOQ status may violate the religious broadcaster's rights under the Establishment Clause, since "the process of review itself might be excessive entanglement."[44] The perils of basing BFOQ status on how closely a position is linked to the espousal of religious views, as the FCC's current rules require, are illustrated by the fact that even superficially secular positions within a religious medium may be constitutionally exempt from prohibitions against religion-based hiring.[45]

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[42] *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *Scharon v. St. Luke's Episcopal Presbyterian Hospital*, 929 F.2d at 363 (quoting *Catholic Bishop*); *Little v. Wuerl*, 929 F.2d at 949 (quoting *Catholic Bishop*).

[43] *E.g., Little v. Wuerl*, 929 F.2d at 949 (quoting *Catholic Bishop*) (broadly construing Title VII's statutory exemption for religious discrimination); *Scharon v. St. Luke's Episcopal Presbyterian Hospital*, 929 F.2d at 363 (quoting *Catholic Bishop*) (rejecting discrimination claim).

[44] *Little v. Wuerl*, 929 F.2d at 949 ("Even if the employer prevails, the process of review itself might be excessive entanglement.")

[45] *See Feldstein v. Christian Science Monitor*, 555 F. Supp. at 978.

V. CONCLUSION

The Religion Clauses of the First Amendment shield many more positions within religious broadcasting from being subject to FCC rules against religiously-based hiring than just those positions which are "connected with the espousal of religious views." Limiting the consideration of religion to such positions imposes an undue burden on the ability of religious broadcasters to achieve their mission, infringing their free exercise rights. Moreover, the very process of inquiring into whether a position is sufficiently religious in nature to merit BFOQ status entangles the FCC in the realm of religious practices and beliefs, raising serious Establishment Clause problems. Finally, the narrow Title VII exemption, on which the FCC's *King's Garden* policy was modelled, was repealed 24 years ago, reflecting a Congressional judgment that it inadequately protected religious organizations' right to internal autonomy. Accordingly, the *King's Garden* policy of limiting the exemption to positions performing "religious activities" should be updated to grant religious broadcasters the exemption they currently enjoy under Section 702 of Title VII of the 1964 Civil Rights Act.

Respectfully submitted,

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DATED: July 1, 1996

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